

Workers' Compensation Section Newsletter

Fall 2015



Contents

From the Chair	1
A Word from the Editor	3
RABA Outing Photos	4
From the Appellate Commission	5
Board of Magistrates Update	6
Workers' Compensation Section Winter Meeting	7
Kids' Chance of Michigan Bowling Fundraiser	8
Caselaw Update	9

From the Chair

By Chris Rabideau



As I write my address to the section on this beautiful Sunday in November, I am reminded of the constants of the seasons in Michigan. Yet again this fall, the leaves are falling, a cool breeze is blowing, and the Lions are losing! Despite that, there are a lot of good things happening in our Section.

I presided over my first council meeting as chair in September at the State Bar of Michigan's office in Lansing. The meeting was well attended by your highly-engaged council members, as well as Chief Magistrate Lisa Klaeren, Agency Director Mark Long, and Commissioner Jack Wheatley. Also present at the meeting speaking on behalf of Kids' Chance of Michigan was former section chair Murray Feldman, Sue Delong, and a Kids' Chance scholarship recipient, Alexis. Kids' Chance of Michigan is a nonprofit organization that provides college scholarships for Michigan children of catastrophically injured workers.

The highlight of the meeting for me was hearing Alexis speak from her heart about how Kids' Chance made a difference in her life by helping her pay for college. In Alexis' case, her father was electrocuted and killed in a tragic industrial accident when she was three years old. Her single mother raised Alexis and her siblings. Showing her grit and determination, Alexis graduated from Crowell Lexington High School with a 3.65 GPA. She is currently a junior at Michigan State University majoring in criminal justice. Alexis has received \$5000 in scholarships from Kids' Chance so far, and if funding is available, will continue to receive scholarship money from Kids' Chance through her graduation. Without financial help from Kids' Chance, it would have been difficult, if not impossible, for Alexis to realize her dream of attending college.

After hearing Alexis' story, as well as the story of other kids who benefit from Kids' Chance, the council unanimously voted in favor of making a \$5,000 contribution from the section's funds to support this very worthy organization. If you would personally like to make a contribution to

Continued on next page

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George Wyatt, III, Michigan Compensation Appellate Commission

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This newsletter is published by the Workers' Compensation Section, State Bar of Michigan

Ella S. Parker, Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council, the membership, or their employers

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From the Chair Continued from page 1

Kids' Chance, or if you know of a child in need of a scholarship who has a parent disabled or deceased from a work accident, please contact Murray Feldman. Kids' Chance currently provides eleven scholarships to college kids, and the organization must raise \$55,000 annually to continue to fund these scholarships.

What is on the horizon for the Workers' Compensation Law Section? Your council is very excited about our upcoming winter meeting on **December 4, 2015** at *The Inn at St. Johns* in Plymouth. Doug Klein of Bleakley, Cypher, Parent, Warren & Quinn, P.C. will be presenting on issues involving Medicare and workers' compensation settlements. Doug is a Medicare guru and will teach us everything we need to know about how to deal with CMS on issues involving conditional payments and Medicare set-aside accounts. Make sure you bring lots of questions for Doug!

Also, prior to the meeting, council member Jayson Chizick will be sending out a section member survey in November to get your opinions about key issues affecting your workers' compensation practice and how the council can better serve you. Please take a few minutes to respond to the survey. Jayson will be presenting the results of the survey at the winter meeting. The council is interested in knowing what's on your mind.

Finally, our appellate expert, Marty Critchell, will provide us with an update on the law. Marty's interpretations of case law are sometimes controversial, but his presentations are always entertaining. Make sure you mark your calendars for the December 4th meeting, and we look forward to seeing you then.

Please note that we have selected the dates and location of the 2016 annual summer meeting and hall of fame reception. The meeting will be held at Boyne Mountain Resort from June 16– 18, 2016. It is not too early to start thinking about hall of fame nominations. If you know of someone you would like to nominate to the Workers' Compensation Hall of Fame, please provide a written statement outlining your support for an individual who has made significant contributions to the workers' compensation practice during her or his career. You can forward your nominations to a member of the hall of fame nomination committee. This year's committee members are Chuck Palmer, Bill Housefield, Chris Rabideau, and Ella Parker. Finally, if you have any suggestions for speakers or topics for the annual meeting, let one of your council members know. ✂



Join the section. It's all it's cracked up to be.
<http://www.michbar.org/sections>



A Word from the Editor

By Ella S. Parker

"If you are grateful for everything, then whatever you have is enough."

—J. Baadsgaard

I read the above quote on Facebook so it must be true, right? That made me curious about who J. Baadsgaard was and, I did what most of us would do nowadays, I googled the name. I couldn't find any additional information about the person but I still liked the message. This led to my mind wondering as I reflected on what I was grateful for and tried to push aside thoughts of what else I would like to have. After all, the purpose of the message for me was to focus on what I was grateful for as many are doing for the month of November. So, the first thing I am grateful for is good friends. Whether I talk to them regularly or only see them sporadically, I have some awesome friends.

Another thing I am grateful for is to live in this Country. While I may not always like the politicians or certain laws, I have the right to vote to try to change those things with which I do not agree. For that, I am grateful.

Also, as I sit here writing this article, Veterans Day is approaching, as is the 240th anniversary of our U.S. Marine Corp. I am grateful for our veterans as well. They are an integral part of why we get to vote to try to change those things we do not like. Today, I would like to dedicate this article to Walt Garrett in Kendall, MI and thank him for his service to our Country in World War II.



Ella and Walt

Some of you may be asking what does being grateful have to do with Workers' Compensation in Michigan? Moreover, what does Walt have to do with Workers' Compensation in Michigan? I'm glad you asked. As Paul Harvey used to say, now for the rest of the story.....

It was a beautiful fall afternoon in October. The bike trail was shaded by a canopy of leaves with glimpses of sunshine peeking through colors of orange, yellow, red and green. The trees were changing colors but they were not yet at their peak. We were enjoying a great afternoon of camaraderie with a group of our fellow RABA bike riders. Others were enjoying the golf course and we were all looking forward to our dinner later in Kalamazoo. As many of you may know, we have a Kalamazoo area association of attorneys known as RABA. I have mentioned before what that stands for so I will not digress here. And, really, the association is open to anyone in the state who would like to participate in either the bike ride or the golf outing.

As is common among the bikers, there is a group who likes to take a shorter route and return to the gathering place sooner and a group who are willing to ride a little farther and enjoy the country around Kalamazoo. This year, Doug Kirk, Chris Morris and I elected to continue on with our ride and eventually ended up in the small town of Kendall, MI at The Kendal Store looking for refreshments. It is truly an old fashion general store with a gathering place on the porch for locals to sit and chat. It is there that we met Walt.

Walt and his wife Kathy own the store. They have the typical drinks and snacks that you find at a lot of stores. But, Walt has something more that you can't find at a quick in and out convenience store. He and his store have character, to go along with the home cooking and charm. It is not a fancy store with glaring fluorescent lights. In fact, I don't think they have air conditioning. Instead, there was a fan blowing in the store. But the refreshments were nice and cold, with plenty of options. While the guys were trying to select their drink of choice, I had an opportunity to look around. One simply has to look at the pictures on the walls to see the history of the place. Walt's descriptions of the town and the store were enchanting. Although he only

[Continued on next page](#)

bought the store 15 years or so ago, the pictures pre-dated his purchase. In fact, the building dates back to the 1800s.

I'm not quite sure how we got on the topic but I think it started with his telling us that he was almost 90 years old. We were guessing he was probably in his 70s, at most. We were wrong. The stories moved on to World War II and Hiroshima. Walt went to Hiroshima several months after the bomb that devastated that city but led to an end of the War for our country. His descriptions were very moving. So, I am grateful for men like Walt, who have protected and defended our country in the past, today and those who may in the future.

I am grateful for friends like Doug and Chris for biking with me and appreciating Walt and his stories as much as I did. I am also grateful for other members of our section like Eric Kihm, who coordinates the RABA golf outing and dinner every October.

As with our section meetings, the attendance at the RABA event is dwindling and the discussion turned to what

we could do to get greater participation. That is something your Council members discuss as well. We put a lot of planning and thought into our annual meetings.

This year, you should be receiving a survey in your emails asking for your input on what topics you would like covered at our annual meetings. Please take the time to submit your responses—I promise it is short and quick.

So, in addition to being grateful for good friends, Walt, and our service men and women, I am grateful to be a part of this wonderful group of attorneys. So now you know, the rest of the story.

Check out some of the pictures of the annual RABA events. Remember, if any of you have any articles you would like to submit or any pictures you would like posted, please feel free to email them to me at my address on page 2 of the newsletter, in the bottom left hand corner.

We are all looking forward to a good turnout for the Meeting in December. ✂

RABA Outing Photos



Chris Morris, this years' winner of the Tour De Kirk Bike shirt. We added Walt's name to the list of participants on the front of the shirt.



Eric Kihm handing off Tom Carey's old trophy



Ben Liggett, the winner of this year's green jacket.

Continued on next page

RABA Outing Photos

Continued from page 4



Ben Liggett and Fred Bleakly

From Front left back around table: Lisa Klaeren, Andy Vorbrich, Doug Kirk, Marissa Bleakley, Fred Bleakley, Joe Byrne, Chris Morris holding our RABA symbol, Ben Liggett (hidden), Jim Giffels, Greg Rapp, Molly Glamzi, and Gary Goidosik



Doug Kirk, Ella Parker and Chris Morris
in front of The Kendall Store

From the Appellate Commission

By George Wyatt, III

The Michigan Compensation Appellate Commission has seen significant personnel changes in 2015. Greg Pryzbylo of Okemos left the MCAC on December 31, 2014 to enter private practice with Lacey & Jones. Phillip Hedges of Lansing joined the MCAC at the end of January 2015 from the Office of Regulatory Reinvention. Phil is a graduate of Albion College and Cooley Law School. Neal Young of Grand Rapids left the MCAC at the conclusion of his term in July 2015. He was replaced on August 1 by Rachel Lipinski of Lansing, Michigan. Rachel was previously employed as corporate counsel in the health insurance industry. She is a graduate of the University of Notre Dame and of the Indiana University Law School. Both Phil and Rachel participate in MCAC panels assigned to workers' compensation appeals. ✖

Board of Magistrates Update

By Lisa Klaeren, Chief Magistrate

With the year quickly drawing to an end, I have been reviewing the yearly statistics that I keep on behalf of the Board of Magistrates. In addition to providing information to those who utilize the Workers' Compensation Agency, these statistics assist me in forecasting the needs of the Board. They also give me a method to evaluate how well we are doing in providing the services that we are statutorily required to provide.

Overall, the Board of Magistrates has met its primary goal of issuing Decisions within 42 days of the record closing. So far in 2015, magistrates have signed their Decisions within 42 days in 96% of the 68 Decisions issued through July of this year. This compares to 90.7% of the Decisions in 2011. The average number of days it takes for a magistrate to sign the Decision in 2015 has been 22 days (our goal is 30 days).

Another statistic I keep is the percentage of cases closed within 30 days of the record opening. Our goal for this area is 80%. Thus far in 2015 the magistrates have closed the record within 30 days in 88% of the cases which have gone to Trial. What this means from a practical standpoint is that once the Trial closes, the parties obtain the result much sooner than they have in the past. It does mean the parties need to be prepared to complete submission of the claim in a timely manner, but with the net result being an earlier Decision, it is a goal that the magistrates will continue to maintain.

Over the last several years, facilitations have become an ever more important part of what we as magistrates do. The facilitation process puts parties in the position of presenting their best possible case to an impartial magistrate for assessment regarding settlement. In 2011, we set our goal for facilitations at 15 per magistrate per month. Since that time, although we have come close, we have not yet met this goal. In 2012 we averaged 12 facilitations per month/per magistrate. In 2013 we averaged 13 per month, and in 2014 we averaged 15 per month. Thus far in 2015 we are averaging 13

per month/per magistrate. We will continue to provide this service to the parties whenever we are asked. Whether we do 12 or 15 per month, our goal remains to provide this service in the most effective manner possible, regardless of how often per month we do so.

I also keep track of the time it takes from the first pre-trial until the Trial Order is signed, and the time it takes from the first pretrial until the redemption Order is signed. From pretrial to signed Trial Order it is currently taking 16.4 months, and from pretrial to signed redemption Order it is taking 19.2 months. There has been a slight improvement (or shortening) of this time period since 2013, and I am optimistic that we can continue to improve upon this timeframe going forward. The Scheduling Orders provide the parties with specific time expectations and should assist everyone in moving cases quickly through the process.

One last statistic I keep is the number of dispositions per magistrate. In 2011 we set a goal of 45 dispositions per magistrate, per month. At that time, with the numbers of cases pending and the number of new cases filed, we ended the year averaging 64 dispositions per magistrate, per month. With fewer cases pending and fewer cases being filed, that number is currently averaging 44 dispositions per magistrate, per month (with 2 fewer magistrates than we had in 2011). This number does reflect the fact that fewer cases are pending before the Board of Magistrates.

What all these numbers should tell us is that the Board of Magistrates is doing a good job of moving cases through the system towards resolution, which is our ultimate goal. With the magistrates use of the Scheduling Order, and with the continued attention by the attorneys, we should all be able to continue to improve on the process and the results we provide to our respective stakeholders. Keep up the good work. ✖



STATE BAR OF MICHIGAN
Workers' Compensation Section

Winter Meeting

December 4, 2015 * 9:00 am – 12:00 pm

The Inn at St. Johns, Galilee Room
44045 Five Mile Road Plymouth, MI 48170

Continental Breakfast and Registration will begin at 8:30 am

Introduction: *Christopher Rabideau, Chairperson and Moderator*

Agenda

- 9:00 – 10:00 am* *General Business Meeting*
- Chairperson's Report – Christopher Rabideau Secretary's Report – Timothy Esper
Treasurer's Report – Dennis Flynn
 - Director's Report – Mark Long
 - MCAC Chair's Report – George Wyatt, III
 - Chief Magistrate Report – Chief Magistrate Lisa Klaeren
- 10:00 – 10:15 am* *Break*
- 10:15 – 11:15 am* *Medicare's Impact on Michigan Workers' Compensation: Then and Now*
Speaker – Douglas Klein, Bleakley, Cypher, Parent, Warren & Quinn, PC
- 11:15 – 11:35 am* *Member Survey Report* by Jayson A. Chizick
- 11:40 – 12:00 pm* *Appellate Update*
Speaker – Martin Critchell, Conklin Benham, PLC

When

November 13, 2015

[Add to Calendar](#)

Where

Drakeshire Lanes

35000 Grand River

Farmington Hills MI 48335



[Directions](#)

Kids' Chance of Michigan Bowling Fundraiser

November 13, 2015

7:00 - 11:00 p.m.

Drakeshire Lanes

35000 Grand River

Farmington Hills MI 48335

Event Information Link:

[Bowling Fundraiser Information](#)



Caselaw Update

By Martin L. Critchell

Since the last issue of the newsletter, the United States Court of Appeals for the Sixth Circuit described who could apply the second sentence of MCL 418.161(1)(n) that says, "On and after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan administrative hearing system determines to be in an employer-employee relationship using the 20 – factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1 C.B. 296." The Court ruled in deciding the case of *Max Trucking, LLC v Liberty Mut Ins Corp*¹ that only the Workers' Compensation Board of Magistrates could apply this statute because "the amendatory language limits use of the Revenue Test to determinations of employment status made in administrative proceedings before the Michigan Administrative Hearing System ('MAHS')." Those outside of the Michigan Administrative Hearing System such as a United States district court, State circuit court, or the Director of the Workers' Compensation Agency can only apply the first sentence of §161(1)(n) that says, "As used in this act, 'employee' means: *** Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." The Court said in *Max Trucking, LLC*,² that "the Revenue Test did not supplant the three-part test. *** [the federal district court] did not err by relying on the three-part test in the first sentence of 161(1)(n) for the definition of 'employee', and not relying on the Revenue Test in the amendatory language of 161(1)(n)."

The Court added that the Board of Magistrates was to apply the twenty criteria of the second sentence of §161(1)(n) and then consider the three criteria of the first sentence because "a finding of independent contractor status under the Revenue Test does not necessarily bar a finding that those services under the surviving three-part test in the first sentence of 161(1)(n). The amendatory language nowhere states that the 20 – factor test is the only test to be used to determine employment status." *Max Trucking, LLC*.³

The Court also explained the meaning of the third sentence of §§(n) that says, "An individual for whom an employer is required to withhold federal income tax is prima facie considered to perform service in employment under this act." In deciding *Max Trucking, LLC*, the Court said that a W-2 can prove employment but a 1099 cannot disprove employment. *Max*

Trucking, LLC.⁴ ("a W-2 is *prima facie* evidence of employee status, issuance of a 1099 is not *prima facie* evidence of independent contractor status under 161(1)(n).")

This decision is authoritative in a case before the federal courts having been released for publication. G Cir. R. 206 (c). ("Reported panel opinions are binding in subsequent panels. Court en banc consideration is required to overrule a published opinion of the court.") The decision is not *binding* in a case before a Michigan court, the Michigan Compensation Appellate Commission, Board of Magistrates, or the Director but must be considered and may be applied as persuasive. *State Bd of Ed v Houghton Lake Comm Schs*.⁵ ("a federal construction of state law is not binding upon this Court [citation omitted], but we find the reasoning in *Ash [v Woodhaven Bd of Ed]*, 699 F2d 822 (CAG, 1983)] persuasive.")⁶

The Michigan Supreme Court and Michigan Court of Appeals only denied requests for review of questions about workers' compensation law with no comment beyond "we are not persuaded that the question presented should be reviewed by this Court."

The three cases decided by the Appellate Commission involved prior orders. The case of *Hensley v Romeo Comm Schs*⁷ involved a mandate by the Appellate Commission for the Board of Magistrates to provide a better explanation for the initial decision. *Hensley*.⁸ ("The opinion on remand, occasioned by the decision of the Commission at 2014 [Mich] ACO 10, directed the magistrate to provide further discussion of [the] analysis of the factual record leading to [the] finding that [Constance L. Hensley] had failed to [prove] a work related psychiatric personal injury.) The Commission found that its mandate had been fulfilled and affirmed. *Hensley*.⁹ ("[T]he magistrate's explanation on remand ... is directly responsive to the inquiry presented by the Commission's remand decision.")

The case of *Shaw v Eaton Corp*¹⁰ involved an earlier decision by the Commission but not a mandate. Eaton Corporation filed a claim to stop wage loss compensation that the Commission had previously ordered. *Shaw*.¹¹ The idea was that any wage loss was from the shutting of the plant where Shaw had been injured. *Shaw*.¹² "[Eaton] [argues] that the magistrate erred as a matter of law [because] any wage loss in this case is attributable to the plant closing in 2006." The Commission refused to consider this idea. And properly so. The plant closing (in 2006) occurred before the hearing that was the basis for the first decision (in 2008), *Shaw*,¹³

and so, barred from subsequent presentation. *Askew v Ann Arbor Pub Schs.*¹⁴ (“The determinative date for res judicata purposes under the new procedure will be the hearing before the [Board of Magistrates].”) The Commission aptly observed that only proving complete recovery could warrant an end to wage loss compensation. *Shaw.*¹⁵ (“Barring a showing of complete recovery from the total disability found in the initial [decision], followed by the emergence of a ‘new’ disability, the causation question remains settled.”)

The case of *Woodford v Grand River Plating, Inc.*,¹⁶ involved a particular kind of order that can be issued before the hearing of an application for mediation or hearing, an order to provide records or a *subpoena duces tecum*. The Board of Magistrates ruled that the *subpoena duces tecum* that had been issued was invalid because it was directed to someone who was not a party to the case and who could never be a party. *Woodford.*¹⁷ (“[The Board of Magistrates] denied intervening plaintiff’s motion to compel General Development Company to comply with a subpoena for the production of records as General Development Company [was] not a party to the proceedings and not subject to the jurisdiction of the Board ...”) On appeal, the Appellate Commission said that the *subpoena duces tecum* was valid because “[M]CL 418.853 *** allows subpoenas to extend beyond parties to all potential witnesses ...” *Woodford.*¹⁸

The pronouncement by the Commission is remarkable for failing to appreciate that §853 distinguishes an order for someone to testify at a hearing to resolve a dispute about workers’ compensation – a *subpoena ad testificandum* -- from an order for someone to provide documents – a *subpoena duces tecum* – based on who or what is the subject of the order. The second sentence of §853 allows ordering anyone to testify by saying that “[t]he director, worker’s compensation magistrates, arbitrators, and the Michigan compensation appellate commission may *** subpoena witnesses ...” But that

same statute does not allow ordering just anyone to provide documents as it continues “and examine such parts of the books and records of **the parties to a proceeding** as relate to questions in dispute.” (emphasis added)

The decision by the Board does not establish a precedent having been decided by a panel of three commissioners, not a majority of a panel of the entire Commission MCL 418.274(3). ✖

Endnotes

- 1 ___ F.3d ___, ___ (CAG 2015).
- 2 *Id.* at ___, ___.
- 3 *Id.* at ___.
- 4 *Id.*
- 5 430 Mich 658, 675; NW2d (1988).
- 6 See, *Deplauty v Troy Sch Dist*, 498 Mich ___ ; ___ NW2d ___ (2015). *ACE American Ins Co v Workers’ Compensation Agency Director*, 498 Mich ___ ; ___ NW2d ___ (2015).
- 7 2015 Mich ACO 10.
- 8 *Id.* at 1.
- 9 *Id.* at 10.
- 10 2015 Mich ACO 11.
- 11 *Id.* at 1 (OWCZARSKI, Commissioner, concurring).
- 12 *Id.* at 2.
- 13 *Id.*
- 14 433 Mich 714, 723-724; 433 NW2d 800 (1988).
- 15 2015 Mich ACO 11, 5.
- 16 2015 Mich ACO 12.
- 17 *Id.* at 1.
- 18 *Id.* at 2.

